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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TERREN S. PEIZER,

Defendant.

No. 2:23-cr-0089-DSF

GOVERNMENT'S POSITION WITH RESPECT
TO THE PSR AND SENTENCING FACTORS
FOR DEFENDANT TERREN S. PEIZER

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorney Brett Sagel, and Glenn S. Leon, Chief, Fraud Section, Criminal Division, and Trial Attorney Matthew Reilly and Senior Litigation Counsel Della

1 Sentilles, hereby files its sentencing position regarding defendant
2 Terren S. Peizer.

3 This sentencing position is based upon the attached memorandum
4 of points and authorities, the presentence investigation report, the
5 files and records in this case, the evidence established at trial,
6 and any other evidence or argument that the Court may wish to
7 consider at the time of sentencing.

8 The government reserves the right to file any supplemental
9 sentencing positions that may be necessary.

10 Dated: December 20, 2024

Respectfully submitted,

11 GLENN S. LEON
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16 /s/

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Terren S. Peizer ("defendant") awaits sentencing following his conviction by jury of three serious felonies relating to illegal trades he made based on material non-public information that he obtained in his capacity as executive chairman and chairman of the board of Ontrak Inc., a NASDAQ-listed public company. To commit these crimes, defendant utilized Rule 10b5-1 trading plans and, in doing so, deceived Ontrak, its shareholders, regulators, and the trading public that he was acting in good faith. In reality, he knowingly used inside information to sell more than \$20 million in Ontrak shares and avoid losses of more than \$12.5 million.

Defendant's conduct strikes at the foundation of our financial markets. It perpetuates the concern that markets are rigged in favor of the wealthy and well-connected to the disadvantage of the ordinary investor. This case presents an important opportunity to send a powerful message to defendant and other in-the-know corporate executives that such abuses of trust and deceit of investors will not go unpunished. The deterrence value here is particularly acute due to defendant's use of Rule 10b5-1 trading plans - a tool designed to *prevent* unlawful insider trading and ensure investor confidence - to engage in insider trading. Corporate executives should be on notice that efforts to conceal misconduct through the tools created to protect them (and the markets) will come at a significant cost and with severe consequences.

As noted in the Pre-Sentence Investigation Report, this was not defendant's first and only time on the wrong side of the law. Most notably, in 1986, defendant was embroiled in one of the most

1 notorious financial frauds of the century when the Southern District
2 of New York charged defendant's boss and mentor Michael Milken with
3 conspiracy, securities fraud, mail fraud, market manipulation, and
4 tax fraud. Defendant, after concealing and withholding subpoenaed
5 materials on Milken's behalf, was provided a Non-Prosecution
6 Agreement ("NPA") to cooperate thereby escaping both a felony
7 conviction and prison time. Despite this once in a lifetime
8 opportunity at a second chance, defendant still could not play by the
9 rules and instead cheated the system to prioritize his own financial
10 interests to the detriment of his company and the investing public.

11 A significant custodial sentence is necessary in this case to
12 reflect the nature and seriousness of defendant's crimes. Moreover,
13 the recommended sentence will deter future criminal conduct by
14 defendant and others similarly situated who wish to flagrantly
15 violate the laws governing the free and fair operation of the United
16 States' securities markets. For these and the reasons set forth below,
17 the United States recommends that the Court impose the sentence
18 recommended by the United States Probation & Pretrial Services Office
19 ("USPO"), including a custodial term of imprisonment of 97 months'
20 imprisonment. Furthermore, the Court should impose a fine of \$10.25
21 million, require restitution to the victim of defendant's crime,
22 impose a sentence of three years of supervised release, and order
23 forfeiture of defendant's ill-gotten gains in the amount of
24 \$12,711,324 pursuant to the government's forthcoming motion for a
25 money judgment.

II. THE PRE-SENTENCE INVESTIGATION REPORT AND RECOMMENDED SENTENCE

A. The Pre-Sentence Investigation Report

On November 21, 2024, the USPO issued its Pre-Sentence Investigation Report ("PSR") for defendant and a recommendation letter. (PSR, Dkt. 375; Recommendation Letter, Dkt. 374.) The USPO calculated that defendant's total offense level under the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") was 30 and determined that defendant falls within Criminal History Category I, which results in an advisory Guidelines range of 97-121 months' imprisonment. (PSR ¶ 132.) The USPO recommended that the Court sentence defendant to a sentence of 97 months' imprisonment on each of Counts 1, 2, and 3 to be served concurrently. (Dkt. 374 at 2.) The USPO further recommended that the Court impose restitution, a three-year term of supervised release, a fine of \$10,250,000, and a mandatory special assessment of \$300. (Id. at 1-2.)

The government has no objections to the PSR and agrees with the PSR's calculation of the applicable Guidelines range. Notably, as established at trial, defendant avoided losses under defendant's May and August Trading Plans was \$12,711,324. (PSR ¶¶ 63-64.) Courts determining the applicable Guidelines range for insider trading have regularly considered both the profits gained from insider trading in advance of positive news as well as the losses avoided from selling prior to the announcement of negative news. See United States v. Martoma, 48 F. Supp. 3d 555, 566 (S.D.N.Y. 2014) (including both "profits and avoided losses" associated with the insider trading conduct); United States v. Gupta, 904 F. Supp. 2d 349, 352 (S.D.N.Y. 2012), aff'd, 747 F.3d 111 (2d Cir. 2014) ("it seems reasonably clear to this Court that the comment limits the calculation to gains made

1 or losses avoided in trades that were based, in whole or in part, on
2 the inside information"). The PSR also properly applied the two-
3 point enhancement based on defendant's role as Ontrak's executive
4 chairman and board chairman. U.S.S.G. § 2B1.4, Application Note 2
5 (The Abuse of Position of Trust or Use of Special Skill enhancement
6 at U.S.S.G. § 3B1.3 "should be applied if the defendant occupied and
7 abused a position of special trust. Examples might include a
8 corporate president or an attorney who misused information regarding
9 a planned but unannounced takeover attempt."). The Zero-Point
10 Offender does not apply because defendant received criminal history
11 points. U.S.S.G. § 4C1.1(a)(1); PSR ¶ 82. Accordingly, the
12 government agrees with the PSR that defendant's applicable Guidelines
13 range is 97-120 months' imprisonment. (PSR ¶ 132.)

14 **B. A Substantial Fine is Warranted**

15 The PSR calculates the fine range for defendant's offense at
16 \$30,000 to \$10,250,000. (PSR ¶ 142.) The USPO then recommends that
17 defendant be fined the statutory maximum fine of \$10,250,000, which
18 is the high end of the applicable Guidelines range. (Dkt. 374 at 1.)
19 The government agrees. The Guidelines instruct that, "[t]he court
20 shall impose a fine in all cases, except where the defendant
21 establishes that he is unable to pay and is not likely to become able
22 to pay any fine." U.S.S.G. § 5E1.2(a). Some of the factors the
23 Court must consider when determining whether a fine is appropriate
24 are: (1) "any evidence presented as to the defendant's ability to pay
25 the fine;" (2) "the burden that the fine places on the defendant and
26 his dependents relative to alternative punishments;" (3) "any
27 restitution or reparation that the defendant has made or is obligated
28 to make;" and (4) "whether the defendant previously has been fined

1 for a similar offense.” U.S.S.G. § 5E1.2(d)(2)-(4), (6). Given
2 defendant’s clear ability to pay, the absence of any burden on him to
3 pay such a fine, that the anticipated restitution is only a fraction
4 of the applicable fine, and that defendant has never been fined for
5 this conduct, the proposed fine is particularly appropriate.
6 Moreover, in light of defendant’s serious misconduct and the
7 financial motives underlying his criminal conduct, a fine is an
8 important and wholly appropriate component of defendant’s sentence.
9 Such a fine is also necessary to reflect the seriousness of
10 defendant’s offense, promote respect for the law, and afford
11 deterrence, particularly when coupled with the government’s and
12 USPO’s positions that defendant be sentenced near the bottom of his
13 advisory guideline range. See U.S.S.G. § 5E1.2(d)(1). Ultimately, a
14 \$10,250,000 fine is consistent with the goal that the amount of the
15 fine “should always be sufficient to ensure that the fine, taken
16 together with other sanctions imposed, is punitive.” U.S.S.G. §
17 5E1.2(d). The government also concurs with the PSR and USPO that
18 defendant is able to and should pay the fine immediately. (PSR ¶
19 129; Dkt. 374 at 1.)

20 **C. Restitution**

21 Restitution is mandatory in this case. 18 U.S.C. § 3663A. The
22 PSR concludes that restitution should be ordered pursuant to U.S.S.G.
23 §5E1.1. (PSR ¶ 146.) The victim in this case is Ontrak, the public
24 company whose material nonpublic information defendant converted for
25 his own use and personal financial gain. (Id. ¶ 52.) At the time
26 of this filing, the government has not yet received a final
27 restitution calculation from Ontrak. In addition, the government is
28

1 still working with Ontrak on how best to ensure that defendant, as
2 the largest shareholder of the company, is not the beneficiary of any
3 restitution paid to Ontrak. As such, the government and Ontrak
4 intend to file further submissions regarding restitution before the
5 sentencing. Pursuant to 18 U.S.C. § 3664(d)(5), a deferred
6 restitution hearing may be calendared at a date not later than 90
7 days after the defendant's sentencing hearing.
8

9 **D. Forfeiture**

10 The First Superseding Indictment included a forfeiture
11 allegation. (Dkt. 105.) The government has prepared and will file
12 with this Court an application for a money judgment of forfeiture in
13 the amount of \$12,711,324. This amount reflects financial benefits
14 received by defendant in connection with the criminal scheme for
15 which he was convicted, as established through the evidence admitted
16 at trial. This money judgment is necessary and appropriate to
17 forfeit the proceeds that came to defendant as a result of his
18 offenses of conviction.

19 **E. Government's Recommended Sentence**

20 For the reasons stated below, the government agrees with the
21 USPO's recommendation and respectfully recommends that the Court
22 sentence defendant to 97 months in custody, three years of supervised
23 release, a mandatory special assessment of \$300, restitution to the
24 victim, and a fine of \$10.25 million. Additionally, in connection
25 with the government's forthcoming application, the Court should enter
26 a forfeiture money judgment in the amount of \$12,711,324.
27
28

1 **III. DEFENDANT'S OFFENSE CONDUCT**

2 Having presided over defendant's jury trial as well as the
3 parties' extensive pre- and post-trial motions, this Court is well
4 versed in the facts and evidence marshalled against defendant in this
5 case. The below is summary of the offense conduct based on the facts
6 included in the PSR.¹

7
8 During the relevant time period, defendant was the founder,
9 executive chairman, and chairman of the Board of Directors of Ontrak.
10 By virtue of his role, defendant was privy to Ontrak's material
11 nonpublic information, including inside information that Ontrak was
12 in serious jeopardy of losing its then-largest customer, Cigna.

13 In early May 2021, with full knowledge of the deteriorating
14 relationship between the two companies, defendant contacted multiple
15 brokers to set up a Rule 10b5-1 trading plan in order to sell
16 hundreds of thousands of shares of Ontrak. Defendant consulted
17 multiple brokers until he could find one that did not require a
18 cooling-off period so that he could sell as soon as possible.
19 Defendant cited the expiring nature of warrants he controlled as a
20 reason for selling, but he knew that while the warrants needed to be
21 exercised, he was under no obligation or pressure to sell the
22 underlying shares. (See, e.g., Trial Tr. 2062:18 - 2063:22.) On May
23 10, 2021, defendant entered into a Rule 10b5-1 trading plan (the "May
24 Trading Plan"). As part of the May Trading Plan, defendant falsely
25
26
27

28 ¹ Facts taken from sources other than the PSR are noted in
separate parenthetical citations.

1 certified that he was not in possession of material nonpublic
2 information despite that he did possess material nonpublic
3 information regarding the serious risk that Cigna would terminate its
4 contract with Ontrak. Pursuant to the May Trading Plan, defendant
5 sold approximately 585,000 shares resulting in approximately
6 \$18,906,000 in proceeds.
7

8 Between May and August of 2021, defendant continued to receive
9 even more material nonpublic information that Cigna would likely
10 terminate its relationship with Ontrak. On August 13, 2021,
11 defendant called Ontrak's lead negotiator to learn whether Ontrak
12 would retain Cigna as a customer. On that call, the employee
13 informed defendant that he believed Cigna was likely to formally
14 terminate its relationship with Ontrak. That same day, within five
15 minutes after this call, defendant entered into a second Rule 10b5-1
16 plan (the "August Trading Plan") to sell even more Ontrak shares.
17 Prior to implementing the August Trading Plan, defendant again
18 falsely certified that he was not in possession of material nonpublic
19 information, when in fact, he did possess such information. Like the
20 May Trading Plan, the August Trading Plan did not implement a
21 cooling-off period and defendant began selling Ontrak shares the next
22 trading day. Prior to Ontrak's public announcement that Cigna had
23 terminated its contract with Ontrak, defendant sold approximately
24 45,000 Ontrak shares over the course of three trading days, resulting
25 in approximately \$900,000 in proceeds. On August 18, 2021, Cigna
26 formally notified Ontrak that it would terminate its contract with
27
28

1 Ontrak. On August 19, 2021, Ontrak filed a Form 8-K with the SEC
2 disclosing for the first time the termination of its relationship
3 with Cigna. Following the announcement, Ontrak's stock price fell
4 approximately 44%.

5 Under the May Trading Plan, defendant made a profit of
6 \$19,213,498. However, if the same amount of shares were sold on
7 August 19, 2021, following the public announcement, the same sale
8 would have only led to a profit of \$6,695,450. As such, defendant
9 had a loss avoidance of \$12,248,045 for the May Trading Plan. Under
10 the August Trading Plan, defendant made a profit of \$988,876.
11 However, if the same amount of shares were sold on August 19, 2021,
12 following the public announcement, the same sale would have only led
13 to a profit of \$525,600. As such, defendant had a loss avoidance of
14 \$436,276 for the May Trading Plan. In total, defendant had a loss
15 avoidance of \$12,711,324.
16
17

18 **IV. SECTION 3553(a) FACTORS**

19 The Court should impose a sentence sufficient, but not greater
20 than necessary, to reflect the purposes of sentencing identified in
21 18 U.S.C. § 3553(a). United States v. Carty, 520 F.3d 984, 991 (9th
22 Cir. 2008). The advisory Guidelines range provides the "starting
23 point and . . . initial benchmark" for the Court's consideration of
24 an appropriate sentence. Molina-Martinez v. United States, 136 S.
25 Ct. 1338, 1345 (2016) (quoting Gall v. United States, 552 U.S. 38, 49
26 (2007)). Although the Guidelines are not binding, they "reflect a
27 rough approximation of sentences that might achieve section 3553(a)'s
28 objectives." United States v. Rita, 551 U.S. 338, 350 (2007).

Under 18 U.S.C. § 3553(a), in arriving at the appropriate sentence, the Court should consider, among other factors, the nature and circumstances of the offense and the history and characteristics of the defendant, § 3553(a)(1); the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, § 3553(a)(2)(A); the need for the sentence imposed to afford adequate deterrence to criminal conduct, § 3553(a)(2)(B); the need for the sentence imposed to protect the public from further crimes of the defendant, § 3553(a)(2)(C); the kinds of sentences available, § 3553(a)(3); and the need to avoid unwarranted sentence disparities, § 3553(a)(6).

V. GOVERNMENT'S SENTENCING RECOMMENDATION

A. Term of Custody

In light of the relevant § 3553(a) factors, a sentence of 97 months' incarceration, which is at the bottom of the applicable Guidelines range, is sufficient, but not greater than necessary, to achieve the goals of sentencing here.

1. Nature and Circumstances of the Offense, Seriousness of the Offense, Respect for the Law, and Just Punishment

Insider trading is a serious offense. It undermines confidence in the markets, betrays the trust of investors in public companies, and is simply the conversion of a company's proprietary information for personal purposes. "In an inside-trading case [the] fraud derives from the 'inherent unfairness involved where one takes advantage' of 'information intended to be available only for a corporate purpose and not for the personal benefit of anyone.'" Dirks v. S.E.C., 463 U.S. 646, 654 (1983) (quoting In re Merrill Lynch, Pierce, Fenner &

1 Smith, Inc., 43 S.E.C. 933, 936 (1968)). The consequences of insider
2 trading are real: such misconduct is widely perceived as cheating,
3 and it deters ordinary investors – without the advantages enjoyed by
4 insider traders – from investing in the markets.² Illegal insider
5 trading continues to be a source of great public anger toward Wall
6 Street as example after example invokes the imagery of an unlevel
7 playing field in our nation's financial markets – and it perpetuates
8 the perspective that that playing field is tilted against the
9 ordinary citizen in favor of the powerful insider. Not only does
10 insider trading harm the integrity of the markets, but it also harms
11 public companies whose business secrets are misappropriated for
12 personal gain.

13 In this case, a 97-month sentence constitutes just punishment
14 because it is commensurate with the nature, scope, and seriousness of
15 defendant's crime as discussed above. Defendant, as executive
16 chairman and chairman of the board, abused his position of trust by
17 using his access to material nonpublic information about Cigna to
18 engage in an insider trading scheme that netted him more than \$12
19 million in losses avoided. To execute the scheme, defendant used

20 ² See Insider Trading and Securities Fraud Enforcement Act of
21 1988, H.R. Rep. No. 100-910, at 7-8 (1988), reprinted in 1988
22 U.S.C.C.A.N. 6043,6044, (stating that "[i]nsider trading damages the
23 legitimacy of the capital market and diminishes the public's faith ...
24 [T]he small investor will be – and has been – reluctant to invest in
25 the market if he feels it is rigged against him"); H.R. Rep. No. 98-
26 355, at 5 (1983) (emphasizing that "[t]he abuse of informational
27 advantages that other investors cannot hope to overcome through their
28 own efforts is unfair and inconsistent with the investing public's
legitimate expectation of honest and fair securities markets where
all participants play by the same rules"); Arthur Levitt, A Question
of Integrity: Promoting Investor Confidence By Fighting Insider
Trading, in vital Speeches of the Day, Vol. LXIV, 354, 355 (Apr. 1,
1998) ("The American people see it, bluntly, as a form of
cheating.").

multiple Rule 10b5-1 trading plans over multiple months to deceive his company, regulators, and the investing public into believing that he was acting in good faith. In reality, he was using the very tool designed to prevent insider trading in order to engage in illegal insider trading. As the USPO recognized, defendant's actions were significant because "there was no doubt or ambiguity regarding the illegal nature of his actions, and he in fact received multiple warnings from multiple brokers regarding his actions, which he disregarded." (Dkt. 347 at 6.) Defendant was a sophisticated financial player - a former trader, a long-time investor and financier, and ultimately a public company CEO and board chairman. Defendant's own witness and Ontrak's former general counsel even referred to him as a "capital markets whiz kid." (Tr. 2268:21-23.) Put simply, defendant knew better than to do what he did. And yet he did it anyway.

His trades were even more brazen in light of the manipulation necessary to effectuate his conduct - using the guise of a Rule 10b5-1 plan to conceal his trading, seeking out a broker with no cooling-off period, disregarding the advice of brokers and lawyers, and trying to hide behind corporate process to claim transparency. Additionally, defendant's text messages to his trading friends and family during the time of his sales reveal the duplicity of his conduct,³ as he told them to either sell, invest in other companies he controlled, or not to buy Ontrak's stock. (Dkt. 162 at 3-6, 162-4 - 162-7.) Defendant framed his conduct to the board, other

³ Certain of this evidence was admitted at trial (Exs. 300, 305, 309A), and other evidence was not admitted or excluded at trial, but the Court can still consider such information in connection with sentencing.

1 executives, his broker, and outside counsel as being for one
2 (legitimate) purpose, while his texts to trading friends and family
3 reveal his full realization of Ontrak's dire situation with Cigna.
4 Similarly, his text messages with his trusted advisor, Shona Seifert,
5 and CEO Jonathan Mayhew contained his true views on the company's
6 standing with Cigna: comparing it to Aetna and bluntly assessing the
7 gravity of the situation. (Exs. 419, 702, 326B, 327.) These
8 unvarnished messages demonstrate that defendant knew the near
9 existential threat posed by the situation and, yet, he said whatever
10 he needed to in order to sell stock anyway.

11 His conduct is all the more egregious because defendant utilized
12 the same fraudulent device on multiple occasions with two different
13 trading plans only months apart. The second trading plan capped off
14 defendant's most shameless conduct where he called an employee
15 (multiple levels below him in the corporate pecking order) to ask
16 whether Cigna was going to terminate. Just five minutes after
17 hearing that "if I had to call it, that I would say that they are
18 going to terminate[,] " defendant falsely certified he had no material
19 nonpublic information and entered into his second 10b5-1 trading
20 plan. (Exs. 515, 608; Tr. 1293:8-1294:9.)

21 Lastly, to effectuate his scheme, defendant needed to lie, a
22 lot: he lied to the company (twice) by falsely signing preclearance
23 forms; he lied to his broker (twice) by falsely signing
24 Representation 1.1 in his 10b5-1 plans that he had no material
25 nonpublic information; he lied (twice) to the U.S. Securities &
26 Exchange Commission in his Form 144s despite a § 1001 warning; and he
27 lied (twice) to the market when he included his false and misleading
28 10b5-1 plans with his Schedule 13D filings. (Exs. 1, 2, 55, 64, 66,

1 67, 254, 259, 345B, 504, 511A.) Then, when confronted by the FBI
2 about his conduct, defendant did not show remorse or take
3 responsibility. Instead, he lied at least four more times to cover
4 up his crimes. (Exs. 802, 804-807.)

5 This was not a crime of happenstance or opportunity -
6 defendant's fraudulent conduct was pervasive, and his scheme was
7 complex. Defendant saw an opportunity - the writing was on the wall
8 after Aetna's termination - and he took full advantage of his
9 powerful perch to avoid additional significant losses. He was among
10 the few insiders to know what was coming for Ontrak's stock price and
11 he was going to take advantage. Defendant's gain was not victimless.
12 Serious insider trading, like defendant's, undermines markets. See
13 United States v. Goffer, 721 F.3d 113, 132 (2d Cir. 2013) (insider
14 trading gain of approximately \$11 million "had major deleterious
15 effects on the market"). Repeated conduct, like defendant's, only
16 amplifies the seriousness of the misconduct and the need for
17 meaningful punishment. This scheme is reflective of deliberate
18 choice and greed. The barriers to insider trading were not
19 impediments to defendant, but tools for exploitation. Defendant
20 methodically played the various institutions and safeguards off one
21 another to present a veneer of legitimacy to his trading and to
22 deflect scrutiny. This represents a depravity and lack of respect
23 for the law that requires severe consequences. See Goffer, 721 F.3d
24 at 132 (upholding a district court's imposition of a 66-month
25 sentence in an insider trading case with gains of approximately \$11
26 million where sentencing court cited defendant's "lack of respect for
27 the law and his deliberate decision, weighing the risks, that insider
28 trading 'was a game worth playing.'"). Defendant was the clever

insider and he masterfully, and illegally, rigged the system in his favor without concern for the legal obstacles in his way.

Defendant's trades occurred on public markets and his trading plans were broadcast to the trading public and regulators through his SEC filings. The recommended 97-month sentence addresses this nature and seriousness of this conduct, defendant's lack of respect for the law, and the need for just punishment.

2. History and Characteristics of Defendant

Defendant was born into a good community and spent a lifetime full of advantage and privilege. (PSR ¶¶ 92-97.) He attended a premier business school at an Ivy League university and his first job was at Goldman Sachs, a highly regarded investment bank. (Id. ¶¶ 98-9.) As the PSR notes, defendant has enjoyed great success professionally and, as a result, holds hundreds of millions of dollars in assets. (Id. ¶¶ 99, 124.) Yet, despite his excellent education and vast resources, defendant chose to employ his talents for a harmful purpose – to break the law – and showed his willingness to do so repeatedly with at least two different trading plans.

Equally troubling is that this was not defendant's first or even second run in with the law. As noted above, in 1986, despite concealing subpoenaed records from the government, defendant was provided an NPA in exchange for cooperating against Milken. See United States v. Milken, 759 F. Supp. 109, 111-113 (S.D.N.Y. 1990) (Fatico hearing findings recounting defendant's testimony that he provided subpoenaed documents, namely "the blue ledger book containing entries evidencing the unlawful agreement between David

1 Solomon and Michael Milken[,]” to Milken’s assistant at Milken’s
2 direction for which he was given “a grant of immunity from both
3 criminal prosecution and SEC sanction”). In essence, defendant was
4 given a once in a lifetime opportunity to start fresh and to escape
5 serious criminal jeopardy relatively unscathed. And yet, despite
6 this stroke of fortune, defendant continued to engage in conduct that
7 required legal attention. As noted in the PSR, defendant has had
8 multiple additional encounters with law enforcement due to a history
9 of driving under the influence and engaging in disorderly conduct.
10 (PSR ¶¶ 82-85; 88-90). Of particular significance is defendant’s
11 interactions with law enforcement approximately ten years ago when he
12 was arrested for disorderly conduct. According to the PSR, during
13 his interactions with law enforcement, defendant became very
14 combative and at one point yelled: “I don’t have to tell you
15 anything! I just want to go home! You guys are making a big mistake!
16 You have no idea who I am! My lawyers will be contacting you in the
17 morning!”. (Id. ¶ 85.) Due to his aggressive behavior, he was
18 arrested. (Id.) Unsurprisingly, defendant displayed a similar level
19 of disrespect and entitlement when he was interviewed by the FBI in
20 connection with the instant matter. See, e.g., Exs. 802, 804-807.
21 Defendant’s prior conduct in connection with a federal investigation,
22 his interactions with law enforcement, and his recidivism, all
23 reflect his disregard for the law and those tasked with its
24 enforcement. Indeed, his insider trading scheme and interactions
25 with the FBI demonstrate that he continues to believe he is not only

1 above the law, but that he can get away with his behavior because of
2 his position of power and privilege. As such, a significant
3 custodial sentence is necessary to ensure that defendant faces the
4 full consequences for his misconduct and to meet the statutory
5 mandate that the sentence promote respect for the law. See
6 § 3553(a) (2) (A) .
7

8 3. The Need for Specific and General Deterrence

9 There is significant general deterrent value to the government's
10 recommended sentence. As the first federal insider trading prosecution
11 based solely on Rule 10b5-1 trading plans, this case presents a critical
12 opportunity for the Court to send a clear message to corporate
13 executives poised to exploit their companies' inside information for
14 personal advantage. As the government stressed at trial and the jury
15 reflected in its verdict: Rule 10b5-1 trading plans are not a protective
16 blanket that corporate executives can use to evade accountability. A
17 serious sentence here will ensure other corporate executives know that
18 they cannot play by their own set of rules. The deterrent power for
19 the sentence in this particular case is only amplified by defendant's
20 use of a tool that is traditionally intended to protect both executives
21 and investors. A critical exhibit in this case - sent to defendant on
22 the eve of his fraudulent scheme - aptly noted that a "Rule 10b5-1
23 trading plan may give rise to an inference of scienter because 'a
24 clever insider might 'maximize' their gain from knowledge of an
25 impending price drop over an extended amount of time, and seek to
26 disguise their conduct with a 10b5-1 plan.'" (Ex. 100 (quoting
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1 Freudenberg v. E Trade Financial Corp., 712 F. Supp. 2d 171, 200
2 (S.D.N.Y. 2010)).) Exploitive abuses, such as defendant's, must be
3 adequately addressed in order to send a clear message to public company
4 executives that such conduct has severe consequences. Indeed, the
5 government's prosecution in this case drew significant attention from
6 the financial press and defendant's sentence will surely echo across
7 Wall Street.
8

9 General deterrence plays an important role in the sentence. White
10 collar crimes, like insider trading, are difficult and costly to detect
11 and prosecute. Would-be criminals know this and likely consider the
12 low prospects of apprehension in deciding whether to engage in such
13 conduct. See United States v. Brown, 880 F.3d 399, 405 (7th Cir.
14 2018), citing Goffer, 721 F.3d at 132 (noting that "high sentences"
15 were necessary to alter the calculus "that insider trading 'was a game
16 worth playing'"); see also Gupta, 904 F. Supp. 2d at 355 (observing
17 that, where a crime is hard to detect, "others similarly situated to
18 the defendant must therefore be made to understand that when you get
19 caught, you go to jail"). For that reason, the sentence imposed needs
20 to correct this imbalance and confirm that those considering engaging
21 in these crimes do not do so. As another court has explained, "fraud-
22 based crimes are more rational, cool, and calculated than sudden crimes
23 of passion or opportunity, [so,] these crimes are prime candidates for
24 general deterrence." United States v. Musgrave, 761 F.3d 602, 609 (6th
25 Cir. 2014). Accordingly, general deterrence is a "crucial factor in
26 sentencing decisions for economic . . . crimes." United States v.
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1 Morgan, 635 F. App'x 423, 450 (10th Cir. 2015); see also S. REP. 98-
2 225, at 76 (legislative history of § 3553 notes that deterrence is
3 "particularly important in the area of white collar crime"). Because
4 of the seriousness of the crime, the difficulty in detecting and
5 prosecuting it, the needs of general deterrence merit a significant
6 sentence.

7
8 The literature is clear that abuses of 10b5-1 trading plans are
9 robust. But, as this case demonstrates, enforcement actions are scant.
10 Academic research has established that trades under "preset plans on
11 average outperform similar trades not conducted under such plans."
12 Alan D. Jagolinzer, SEC Rule 10b5-1 and Insiders' Strategic Trade
13 (February 1, 2009) MANAGEMENT SCIENCE (available at
14 <https://ssrn.com/abstract=541502>). And short-trigger plans by
15 executives, like defendant, who trade soon after entering in 10b5-1
16 trading plans "systematically avoid losses and foreshadow considerable
17 stock price declines." David Larcker, Bradford Lynch, Phillip J.
18 Quinn, Brian Tayan, and Daniel J. Taylor, Gaming the System: Three 'Red
19 Flags' of Potential 10b5-1 Abuse (January 19, 2021) ROCK CENTER FOR
20 CORPORATE GOVERNANCE AT STANFORD UNIVERSITY (available at
21 <https://ssrn.com/abstract=3769567>). In other words, defendant engaged
22 in misconduct using a tool ripe for fraud, but under prosecuted. In
23 such instances - where crimes, like insider trading, are both highly
24 lucrative and difficult to detect - significant punishment is necessary
25 to deter others from similar conduct. See United States v. Heffernan,
26 43 F.3d 1144, 1149 (7th Cir. 1994) (Posner, J.) ("Considerations of
27 (general) deterrence argue for punishing more heavily those offenses
28 that either are lucrative or are difficult to detect and punish, since

1 both attributes go to increase the expected benefits of a crime and
2 hence the punishment required to deter it."). As one district court
3 explained: "insider trading is an easy crime to commit but a difficult
4 crime to catch. Others similarly situated to the defendant must
5 therefore be made to understand that when you get caught, you will go
6 to jail." Gupta, 904 F. Supp. 2d at 355. Other public company
7 executives - whether using Rule 10b5-1 trading plans or other tools
8 that can be exploited to conceal illegal trading - should be put on
9 notice through the sentence in this case that abuses of corporate power
10 for personal profit will be met with substantial terms of
11 incarceration.

12 Finally, here, in light of defendant's continued interest in a
13 number of public companies, there remains a real risk of future insider
14 trading abuse. (PSR ¶ 124 (including a \$250 million position in one
15 public company).) The recommended sentence will have a meaningful
16 specific deterrent effect on defendant himself. While defendant's
17 conviction may make it more difficult for him to achieve high-ranking
18 roles at the public companies he is invested in - and therefore mitigate
19 the likelihood that he will be privy to material nonpublic information
20 - his capacity to purchase shares and insert himself in powerful roles
21 in the future is not far-fetched. Given defendant's continued role as
22 a shareholder of significant means in multiple public companies, the
23 risk that he could again capitalize on his privileged access to
24 corporate information is high. And, as defendant already engaged in
25 misconduct in connection with a federal fraud investigation decades
26 ago, and still engaged in recidivist behavior, the Court's sentence
27 should be sure to provide the necessary deterrence this time to prevent
28 defendant from committing additional crimes. In this regard, the

1 recommended sentence adequately addresses the statutory need for
2 specific deterrence.

3 4. The Need to Avoid Unwarranted Sentence Disparities

4 Finally, a sentencing court is also required to consider "the need
5 to avoid unwarranted sentence disparities among defendants with similar
6 records who have been found guilty of similar conduct." 18 U.S.C. §
7 3553(a)(6). Although no two cases are the same, the sentence imposed
8 by this Court, United States v. Loman, 2:19-cr-00695-DSF, is a helpful
9 guidepost here. In Loman, the defendant was convicted by a jury of
10 eight counts of insider trading and Loman profited in the amount of
11 approximately \$476,000. The Court sentenced Loman to 35 months'
12 imprisonment. See Loman, Judgment, Dkt. 122. Like Loman, defendant
13 had access to material, non-public information by virtue of his
14 position at a company and used that information to trade. Defendant's
15 conduct is even more egregious given the more prominent roles he held
16 in the company and his position as a nearly 50% shareholder in Ontrak.
17 In addition, defendant avoided over \$12.6 million in losses, which is
18 exponentially more than Loman's profits.

21 Another example of a significant custodial sentence being imposed
22 for insider trading is United States v. Martoma, 1:12-cr-00973-PGG,
23 Dkt. 293 at 4-5 (S.D.N.Y. 2014). In Martoma, the defendant caused his
24 hedge fund to trade after obtaining inside information about
25 unsuccessful drug trials from two doctor consultants to the company.
26 Id. While the hedge fund was able to realize significantly greater
27 profits and losses avoided than in this case, the defendant's personal
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1 gain in Martoma was comparable to defendant's avoided losses: a \$9.3
2 million bonus. Id. The defendant in Martoma was sentenced to 108
3 months' incarceration. Id., Dkt. 315.

4 These sentences are simply probative of the appropriate nature
5 and range of insider trading sentences judges give for similar conduct,
6 and undermine any claims defendant may make that a Guidelines sentence
7 would result in an unwarranted sentencing disparity. Thus, the
8 government's recommendation for a 97 month term of imprisonment would
9 not result in an unwarranted sentencing disparity among defendants with
10 similar records who have been found guilty of similar conduct.
11

12 **VI. CONCLUSION**

13 For the above reasons, the government respectfully requests that
14 the Court impose the following sentence as to defendant Terren S.
15 Peizer: (1) 97 months' imprisonment; (2) a three-year period of
16 supervised release; (3) a fine of \$10.25 million; (4) restitution to
17 be determined at a later date; and (5) a mandatory special assessment
18 of \$300.
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